

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

19-CR-651 (SHS)

MIRCEA CONSTANTINESCU,

Defendant.

ORDER

SIDNEY H. STEIN, U.S. District Judge:

On March 7, 2023, defendant was sentenced principally to a term of imprisonment of 92 months. Defendant's direct appeal of his conviction and sentence is currently pending.

On January 26, 2024, the Court received a motion from defendant requesting that the Court reduce his sentence pursuant to Amendment 821 to the Sentencing Guidelines which went into effect on November 1, 2023, and applies retroactively.

The Court has determined that defendant is not eligible for a sentence reduction. Defendant is precluded from the status points reduction in Amendment 821 because he did not receive an enhancement for committing the instant offense while under a criminal justice sentence. *See U.S.S.G. § 4A1.1.* In addition, while defendant is eligible for the zero-point offender recalculation, *see U.S.S.G. § 4C1.1*, he is ultimately precluded from a sentence reduction because the original sentence of 92 months is below the low end of the effective recalculated guideline range, which is 94 to 101 months.

Generally, the docketing of an appeal divests this Court of jurisdiction to consider a post-judgment motion. *See United States v. Larkin*, No. 19-CR-833, 2022 U.S. Dist. LEXIS 71898, at *2 (S.D.N.Y. Apr. 19, 2022) (collecting cases). However, the Federal Rules of Criminal Procedure were amended in 2012 to permit a district court to issue an indicative ruling on a motion for relief that would otherwise be barred by a pending appeal. Pursuant to Rule 37, the Court has three potential courses of conduct "[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Crim. P. 37(a). The Court may "(1) defer considering the motion; (2) deny the motion; or (3) state that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a

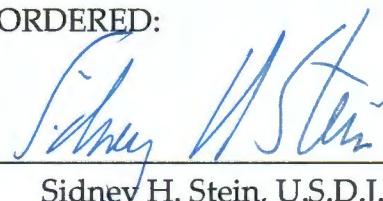
substantial issue." *Id.* Here, because the Court would deny defendant's motion if no appeal were pending, the Court hereby DENIES the motion in an indicative ruling pursuant to Rule 37.

The Clerk of Court is directed to mail a copy of this Order to Mircea Constantinescu (#20649-104), FCI Fort Dix, Federal Correctional Institution, Satellite Camp, P.O. Box 2000, Joint Base MDL, NJ 08640.

Dated: New York, New York

January 31, 2024

SO ORDERED:



Sidney H. Stein, U.S.D.J.